IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FLUOR DANIEL, INC.	:	CIVIL ACTION
v.	:	
PURALUBE, INC.	:	NO. 98-963

Newcomer, J. November 1998

M E M O R A N D U M

Presently before the Court is plaintiff's Motion for Summary Judgement, defendant's response thereto, and plaintiff's reply thereto. For the reasons that follow, said motion will be granted in part and denied in part. Summary judgement will be granted on Counts I, III, IV, and V of defendant's counterclaim, and denied on both Counts of plaintiff's claim, and Count II of the counterclaim.

I. Background

A brief sketch of the facts of this case is warranted solely for the purpose of placing this decision in context.[1]

This is a diversity breach of contract action between plaintiff Fluor Daniel, Inc., a California engineering and construction firm with its principal place of business in Irvine, California, and defendant Puralube, Inc., a Delaware company

[1]The parties have submitted briefs totaling over one hundred and sixty (160) pages, of which approximately one-half contain the parties respective factual summaries. As the parties are well versed in the facts of their cases, the Court will not attempt to summarize the facts in any detail. Relevant facts will be addressed as they arise in the context of the rulings on the issues. In addition to the lengthy briefs, the parties have submitted several thousand pages of exhibits. The Court has read the parties briefs several times, and has considered every exhibit referenced by either party in this decision.

organized for the purpose of producing and marketing lube oil products refined from used lube oil, with its principal place of business in Wayne, Pennsylvania. In February, 1995, Puralube entered into an exclusive licensing agreement with a company called UOP to utilize UOP's patented HyLube technology, which aids in the refining of used oil. As a part of their arrangement with UOP, Puralube had to build plants to re-refine this oil. The first of these, and the subject of the instant suit, was the "re-refinery" in Fairless Hills, Pennsylvania.

Puralube solicited several engineering firms to bid on the Fairless Hills plant in the form of a Request For Proposal ("RFP), whereby they said that they will contract an engineer to provide engineering design and plant construction. Puralube requested detailed engineering for the site facilities, with a not to exceed ceiling, a budget estimate for constructing the site facilities, and a proposed schedule for engineering and estimated completion of site facilities construction. They also stated that they wanted to "give close scrutiny to limiting capital for the new plant," and authorized the installation of refurbished equipment in order to reduce the cost. They further stated that they wanted to use the detailed engineering package described in the proposal to set a fixed price turn key contract, and that meeting a contracted construction schedule is

essential.[2]

After an initial proposal was submitted, Puralube requested an estimate for constructing the process unit as well, and on April 11, 1996, Flour Daniel submitted a slightly revised proposal for the site facilities as well as their estimate for the process unit. The combined projected total was $26,525,000, plus 25%, minus 15%, with a high range of $33,157,000. This bid was submitted by a member of the Oklahoma office, not the Marlton office that would ultimately do the engineering design work.[3]

It was also important to Puralube that the engineering firm it selected invest in the project, and Flour Daniel, initially at least, expressed an interest to Puralube in investing capital in the project. Fluor Daniel was awarded the contract in July. Although discussions about investing in the project continued throughout most of the life of the relationship, no agreement on financing was ever reached.

Flour Daniel began the design work. During this process, negotiations were ongoing concerning the final form the contract would take. Generally, Flour Daniel wanted to be paid for their engineering services on an hourly rate, and Puralube wanted total engineering, procurement, and construction ("EPC") services contract. They wanted a fixed, turnkey contract in the range

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[2]Puralube also wanted to use non-union labor, a fact known to and acknowledged by Fluor Daniel.

[3]Howe-Baker, the firm presently working with Puralube on this project, also bid initially, Their estimate was very close to Fluor Daniel's at 26.25 million, plus 20%, minus 10%.

proposed by Fluor Daniel in its initial estimate, focusing on the $26 million dollar figure. Both sides agree that Puralube was vocal in its desire for the project to come in around that figure, but while Puralube viewed this as a must, Fluor Daniel merely viewed this as a wish. While the parties vigorously contend what they committed themselves to throughout the process, the only thing that is certain is that there is no writing agreed to and signed by both parties for a project that contemplated millions of dollars in engineering services, and tens of millions in construction.

As the months passed, Fluor Daniel worked and submitted invoices for their work, and Puralube approved the invoices but never paid them. In September, Fluor Daniel stopped work on the project, Puralube paid them $150,000[4] as a show of good faith, and Fluor Daniel resumed their work. It appears that while this work was ongoing, the engineers and estimators were unaware of the terms proposed in the initial estimate, so Puralube's requests in their RFP to limit expenditures and use refurbished equipment were not considered as the design team continued its work.

In late October, representatives from Fluor Daniel accompanied Puralube's representatives in Chicago as Puralube sought financing. At these meetings, Puralube used a Private Placement Memorandum ("PPM") to give to the banks in their

[4]This number is significantly less than the amount Fluor Daniel believed it was owed.

proposals. The PPM included representations that Fluor would construct the project on a fixed-price, date-cetain, turnkey basis, and will be a significant investor in the project. The PPM also contained representations that the cost would be about $26.5 million. Fluor had seen these in early September. Fluor Daniel participated in the financing meetings, and allegedly told the lenders that the terms of the EPC contract and Fluor Daniels' financial participation were still under negotiation, but that Fluor Daniel was committed to support the project.

The final estimate for the project was delivered to Puralube in December. It was for approximately $55.3 million, which surprised both parties. Fluor Daniel argues that this number was a result of a recommendation to use union labor, changes and increases in the scope of the project insisted on by Puralube. Puralube contends that this is a result of over engineering, ignoring their mandate to reduce costs, an inexperienced design team, the unnecessary and unauthorized inclusion of union labor in the estimate, and the addition of numerous contingencies and allowances.

Although efforts were made to reduce the costs, the relationship was ultimately terminated. Puralube sought the services of Howe-Baker, who has apparently agreed to do the project for about $33.5 million.

Fluor Daniel brought a two count complaint against Puralube alleging in Count I breach of contract and in Count II promissory estoppel. They are seeking payment for the engineering services

they provided but were never paid for in the amount of $817,460.34 plus interest. Puralube has filed a counterclaim. Count I alleges breach of contract; Count II alleges unjust enrichment; Counts III and IV allege a breach of the covenant of good faith and fair dealing; and Count V alleges fraudulent inducement.

Plaintiff and counterclaim defendant Fluor Daniel has filed the instant motion for summary judgement on both of their claims, as well as all five counterclaims.

II. Summary Judgement Standard

A reviewing court may enter summary judgment where there are no genuine issues as to any material fact and one party is entitled to judgment as a matter of law. White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988). The evidence presented must be viewed in the light most favorable to the non-moving party. Id. "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).[5] In deciding the motion for summary judgment, it is not the function of the Court to decide disputed questions of fact, but only to determine whether genuine issues of fact exist. Id. at 248-49.

[5]Although this is a bench trial, the Court's role on summary judgement is no different. In re: Unisys Savings Plan Litigation, 74 F.3d 420, 433 n.10 (3d. Cir.), cert. denied, 519 U.S. 810 (1996).

The moving party has the initial burden of identifying evidence which it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988). The moving party's burden may be discharged by demonstrating that there is an absence of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 325. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings and designate specific facts, by use of affidavits, depositions, admissions, or answers to interrogatories, showing that there is a genuine issue for trial. Id. at 324. Moreover, when the nonmoving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d Cir. 1987) (quoting Celotex, 477 U.S. at 322). Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." White, 862 F.2d at 59 (quoting Celotex, 477 U.S. at 322).

III. Discussion

a. Plaintiff's Claims

1. Count I

Plaintiff contends in Count I that Fluor Daniel and Puralube entered into a contract whereby Fluor Daniel was obligated to

perform preliminary engineering and design services for the re-refinery project and Puralube was obligated to pay for those services. Plaintiff argues that in the initial March, 1996 proposal, they made an offer to provide engineering and procurement services for the re-refinery project on a cost reimbursable basis. This offer was contained in a section of the offer titled "COMMERCIAL AGREEMENT," which provided in pertinent part:

> [Puralube's] assent to [Fluor Daniel] performing services prior to execution of a mutually acceptable contract or [Puralube's] acceptance or use of [Fluor Daniel's] services or information in advance of such a contract will constitute [Puralube's] agreement that the terms of the attached agreement shall control until such definitive contract is executed by both parties.

(Pl. BR. at 16.) They further contend that this offer was communicated in their April proposal because it emphasized that the April proposal was being submitted in accordance with the terms of the March Proposal. Fluor Daniel believes that Puralube accepted this offer through their conduct by authorizing Fluor Daniel to begin work, authorizing the invoices, and never demanding that Fluor Daniel perform this other than on the terms set forth in the March proposal.

Puralube disagrees and argues that this offer was rejected by Puralube on May 23, 1996, when Puralube made a counter-offer which proposed a turnkey EPC contract for a fixed price, much like the RFP had contemplated from the beginning. On June 11, 1996, Fluor Daniel responded, proposing that engineering be conducted on a cost-reimbursable basis, and that the parties work

toward a lump sum through negotiations. These negotiations continued for months.

"[A] reply to an offer, which changes the conditions of the offer is not an acceptance, but a counter-offer." Accu-Weather, Inc. v. Thomas Brad Co., 625 a.2d 75, 77 (Pa. Super. 1993). A counter-offer renders an agreement unenforceable. Id. Drawing all inferences in favor of Puralube, there is ample evidence in the record to support their position that they rejected Fluor Daniel's offer with a counter-offer and never entered into a contract. Therefore, summary judgement will be denied on Count I of the Complaint.

2. Count II

If there was not contract, Plaintiff argues, then they are entitled to recover under the theory of promissory estoppel. Under Pennsylvania law, the elements of promissory estoppel are: 1) the promisor makes a promise that can be reasonably expected to induce action or forbearance by the promisee; 2)the promise does induce action or forbearance by the promisee; and 3) injustice can only be avoided by enforcing the promise. See Carlson v. Arnot-Ogden Memorial Hosp., 918 F.2d 411, 416 (3d Cir. 1990)(citing Cardamone v. Unversity of Pittsburgh, 384 a.2d 1288, 1233 (Pa Super. 1978). Plaintiff argues that Puralube asked Fluor Daniel to provide engineering for the project, Puralube knew that Fluor Daniel expected to be paid on a cost-reimbursable basis, Puralube made a payment of $150,000, and Puralube approved an additional $32,000 when Fluor Daniel requested this in

anticipation of going over the $950,000 budget contemplated for preliminary engineering services. `

Plaintiff presents a strong case. Fluor Daniel points to the deposition transcript of Johnathan Frank, a former Puralube executive who attended what the parties have termed the "kick-off" meeting where the work was initially authorized. In his testimony, Frank says that there was an oral agreement to pay Fluor Daniel as billed for their services. When Flour Daniel sent a letter saying that they would not continue work on the project until some resolution of the payment issue has been achieved, Puralube responded by sending $150,000. The letter that preceded that check stated, "[w]e are prepared to show our good faith by sending a $150,000 check early next week toward the outstanding invoices. Fluor Daniel argues that they began work in reliance on the initial promise by Frank, and that the letter and payment of the $150,000 confirmed that promise and bolsters their position that their reliance was justifiable. Although strong, this evidence is ultimately not sufficient for summary judgement.

For purposes of this motion, after viewing the evidence in the light most favorable to Puralube, there are genuine issues of material fact concerning both the existence of the promise plaintiff allegedly relied on, and the reasonableness of such reliance. Defendant has produced evidence that both before and after this alleged oral promise, Puralube explicitly refused to enter into a separate contract for engineering services contract.

They have maintained from the outset that they wanted a complete contract for engineering services, procurement, and construction, and expressly rejected offers to the contrary. Accepting their theory of the negotiations, which they have amply supported in the record, the preliminary engineering and design work was to be done for the purpose of narrowing the range of error in the estimate and arriving at a lump sum turnkey contract. Fluor Daniel's fees were limited to $950,000, and there is evidence from both parties that payment of these fees was contingent upon the arrival at the lump sum contract. The payment of the $150,000 and the letter acknowledging the outstanding invoices is not inconsistent with this position. According to Puralube, the payment was made as a show of good faith, and there is nothing in the letter or the record to suggest that Puralube did not intend for those invoices to remain outstanding until after the turnkey contract was entered into. Interestingly, In Fluor Daniel's letter requesting payment, they never said that they wanted to be paid according to any agreement, they just said that they wanted to be paid. Accordingly, summary judgement is not warranted on Count II of plaintiff's Complaint.

B. Defendant's Counterclaims

1. Count I

Plaintiff also moves for summary judgement on all of defendant's counterclaims, the first of which alleges that plaintiff breached an oral EPC contract, the alleged terms of which are as follows:

a. Fluor Daniel would design and build the Puralube refinery at a cost of approximately $26.5 million, not to exceed $33.1 million;

b. The portion of the $26.5 million cost that would be attributable to Fluor Daniel's fees and reimbursable expenses incurred in the preliminary design and engineering (pre-construction) phase would not exceed $950,000 without Puralube's express permission;

c Puralube's payments to Fluor Daniel, prior to closing on permanent financing arrangements with third parties, would not exceed $450,000. Any balance would be paid after closing; and

d. The preliminary design phase would be completed within approximately 100 days of the parties' July 1996 initial agreement.

Counterclaim, ¶ 16. As the Court understands defendants claim, the theory is that plaintiff orally agreed to be contractually bound to design and build the refinery at a cost of between approximately $26 million and $33 million.

"The existence and terms of an oral contract must be established by 'clear and precise' evidence." Browne v. Maxfield, 663 F.Supp. 1193, 1197 (E.D. Pa. 1987) (citations ommitted). In order for a contract to be enforceable, both parties must have "manifested an intention to be bound by its terms" and the terms must be "sufficiently definite to be specifically enforced." ATACS Corp. v. Trans World

Communications, Inc., 155 F.3d 659 (3d Cir. 1998)(citation ommitted).

Plaintiff argues that not only is there not clear and precise evidence that an oral EPC contract existed, there is not any evidence that the parties mutually assented to any oral EPC contract at any point.

Puralube points to the following evidencing Fluor Daniel's intent to be bound: Fluor Daniel's participation in the metes with bankers; its acquiescence in the statement of the PPM, and assurances to Puralube that the job would be brought in on time, and on "budget." Finally, Puralube points to the testimony of MR. Holly, who handled these issues for Puralube. In his testimony, he declines to say that the parties had a contract, but instead said that they had an oral business agreement. The terms of the agreement, according to Mr. Holly were that Fluor Daniel would construct a refinery revolving around $26.5 million dollars and that Puralube would pay for those services. There was also an understanding that Fluor Daniel would commit equity to the project, and two other pieces of the proposal that Puralube was in the "process of trying to document in the form of a letter of intent to be later supported by individual contracts for each of them." (Holly Dep. at 104-105.)[6]

[6]Puralube also cites to the deposition testimony of Dr. Shimmelsbusch, claiming that the parties made clear that an understanding was reached whereby Fluor Daniel would perform the EPC contract within the stated range. The Court has reviewed Dr. Schimmelsbusch's testimony, and nowhere does he say that there was an agreement whereby Fluor Daniel would perform the EPC contract. What he said was that there was an understanding that the price would come in

None of this evidences in any way Fluor Daniel's intent to be bound. Fluor Daniels participation in the Chicago financing meetings directly contradict the notion that an EPC contract existed. Fluor Daniel's representatives specifically stated that there was not an EPC contract, that negotiations were ongoing, but that they continued to support the project. As for the PPM's, again, in representations to third parties, Fluor Daniels representatives qualified them with the caveat that no contract actually existed. Finally, the testimony of Mr. Holly offers no support for Puralube's position. Aside from choosing not to characterize the agreement as a contract, what he testified that he believed the terms of the agreement to be included elements that Puralube is not even alleging were a part of the agreement, like equity financing. By this testimony, Puralube's chief witness is not even certain what the terms of the agreement Puralube is now alleging plaintiff agreed to are. Further, Holly testifies that they were in the process of trying to document this agreement in the form of a later of intent. There is not even any evidence submitted that this letter of intent was signed by Fluor Daniel.

Defendant has not produced sufficient evidence that Flour Daniel ever manifested an intent to be bound by the terms Puralube suggests. Virtually all of the evidence in this case

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around $26.5 million, plus or minus, and that they wanted this to be addressed in a letter of intent, which was never signed. This testimony adds nothing to Puralube's claim.

clearly demonstrates that there were continuous negations throughout the course of the relationship whereby Fluor Daniel was constantly trying to separate the payment for the preliminary engineering services from the concept of an EPC contract, and Puralube insisted that they all remain a part of the proposed deal.[7] There is no evidence from which a reasonable jury could find that Fluor Daniel agreed orally to build Puralube a refinery for less than $33 million. In short, even when viewing all evidence in the light most favorable to the defendant, defendant has not produced clear and precise evidence of the existence of an oral EPC contract, so summary judgement in favor of Fluor Daniel on Count I of the Counterclaim is appropriate.

2. Count II

Plaintiff also moves for summary judgement on Count II of the Counterclaim for unjust enrichment. Plaintiff argues that the claim for unjust enrichment must be dismissed because, "under Pennsylvania law, a claim for unjust enrichment cannot be based on an express agreement." Birchwood Lakes Community Ass'n v. Comis, 442 a.2d 304, 309 (Pa Super. Ct. 1982). Since both parties are asserting the existence of a contract, Puralube's claim should be banned. Defendant argues that, as to their

[7]Further, all of the objective evidence of Fluor Daniel's actions while engineering and estimating the plant costs support this position as well. If they had intended to be contractually bound as defendant alleges they did, Fluor Daniel certainly would have shown the RFP and other alleged commitments they made to the people designing the plant. The people involved with preparing the final estimate would certainly be made aware at some point the Fluor Daniel was contractually bound to provide a certain final price.

contractual claim, they are merely pleading in the alternative, and as to plaintiff's contractual claim, they deny the existence of said contract, making an application of Birchwood to the facts of this case inappropriate. The Court agrees with Puralube. Since defendant's breach of contract claim has been dismissed, it is possible that, based on the evidence in the record, a reasonable jury could find that no contract for engineering services existed. This reasonable jury could further conclude that, based on the quantity and quality work product produced by Fluor Daniel in connection with their mandate in the RFP, Puralube is entitled to some or all of its $150,000 back. Accordingly, the Court will deny plaintiff's motion as to Count II.

3. Counts III and IV

Next, Plaintiff argues that Counts III and IV of the complaint must be dismissed because the implied covenant of good faith and fair dealing cannot stand where there is no contract. This argument necessarily must fail because, although the Court has dismissed Puralube's claim for breach of contract, Fluor Daniel still has a viable contract claim. Should the jury find the existence of a contract for engineering services, they could also find that Plaintiff violated the implied covenant. In light of this, the Court will individually address the remaining arguments concerning the two counterclaims.

Count IV of the counterclaim alleges that Fluor knew that it could not construct the refinery at the cost promised to

Puralube, but duped Puralube into engaging Fluor Daniel's services and obtaining payment for design and engineering services. Fluor Daniel argues that Count IV should be dismissed because it is just an alternate phrasing of Puralube's fraud claim. They argue that "there is no implied duty of good faith where a plaintiff has recourse to an independent cause of action to vindicate the same rights with respect to which the plaintiff invokes the duty of good faith." Fremont v. E.I. Dupont DeNemours & Co., 988 F.Supp. 870, 874 (E.D. Pa. 1997). Since the Court will dismiss defendant's fraud counterclaim with the disposition of the instant motion, this argument, too, must fail.

Unfortunately for defendant, however, the Court's disposition of Count V for fraud necessarily leads to the conclusion that Count IV must also be dismissed. As discussed more fully infra, there is no evidence that Fluor Daniel knew that it could not construct the re-refinery at the cost in the proposal at the time the proposal was submitted, nor is there any evidence that Fluor Daniel "duped" Puralube into engaging in Fluor's services.[8] Accordingly, the court will dismiss Count IV of the counterclaim.

Count III of the counterclaim, also alleging a breach of the impled covenant of good faith and fair dealing, alleges that Fluor Daniel deliberately and knowingly overstated the

[8]Based on the complete lack of evidence that Fluor uttered a fraudulent misrepresentation in this context, the fact that the standard of proof differs for fraud and the implied covenant of good faith and fair dealing is immaterial.

construction costs in order to frustrate and interfere with Puralube's construction of the refinery. Although it is uncontested that Fluor Daniel's bid was twice what was expected, and that Fluor Daniel used union labor and numerous contingencies in calculating their final estimate for the re-refinery, Puralube has produced no evidence supporting their allegation that this was done deliberately and knowingly to frustrate and interfere with Puralube's construction of the refinery. Therefore this claim must also be dismissed on summary judgement.

4. Count V

Count V of defendant's counterclaim alleges fraudulent inducement. The crux of the allegation is that Fluor Daniel misrepresented the initial proposal they submitted to Puralube and knew they could not construct the refinery at that cost. In their response brief, Puralube said that the misrepresentation was when Fluor Daniel submitted their budget construction estimate. Although not identical to their pleading, both claims are essentially the same. The claim boils down to Puralube's belief that Fluor Daniel said they were going to do something (design and construct a refinery within a stated range) that Fluor Daniel never had any intention of doing. This clearly satisfies Federal Rule of Civil Procedure (9)b's mandate that the circumstances constituting fraud or mistake be pleaded with particularity, and does not evidence the "moving target" theory of pleading plaintiff complains of in his reply brief.

Turning to the merits of Puralube's claim, to sustain a

claim for fraud, the claimant must show by clear and convincing evidence: 1) a misrepresentation; 2) a fraudulent utterance thereof; 3) an intention by the maker that the recipient will thereby be induced to act; 4) justifiable reliance by the recipient on the misrepresentation; and 5) damage to the recipient as proximate result. Bortz v. Noon, 698 a.2d 1311, 1315 (Pa. Super. 1997).

The alleged misrepresentation occurred, according to Puralube, when Fluor submitted its budget construction estimate. Much is made in both parties briefs concerning the nature of just what was intended by Fluor Daniel's submitted estimates. Fluor contends that they were merely providing rough estimates, and that what they submitted was full of caveats and limitations, including a large error range (-15%,+25%), which they claim alerted Puralube that Fluor Daniel was merely providing a rough, preliminary estimate based on paper requirements, and a disclaimer refusing to warrant or guarantee the estimate's accuracy. (Pl. Br. at 5). On the page of their proposals with the numerical breakdown of the estimates, it is clearly written on the top center of the page that this is a screening estimate, and at the bottom of the page, in the notes section, it lists the type of estimate as conceptual. Nassau Ex. 2 at 5-2. The screening estimate is important because the testimony of Steven Meers, relied on by Puralube, defines a screening estimate as "a rough order of magnitude estimate to determine which of several alternatives you may pursue or if a specific alternative . . .

looks like it's an economical cost for the project." Meers Dep. at 15. Further, in their reply brief, they point to the testimony of MR. Frank[9] who said that it was known by all that they were merely dealing with best guess estimates. In short, their position is that they did not misrepresent anything, that Puralube got exactly what Fluor Daniel told them they were getting.

Puralube, on the other hand, contends that Fluor Daniel said that they were submitting a proposal in accordance with the RFP, including a budget construction estimate. Puralube makes much of its argument about what was meant by the term budget estimate. They argue that the term budget estimate is well known throughout the industry, and that by submitting it, Fluor Daniel manifested an intent to be bound by its terms. In all of their 92 page brief and thousand plus pages of exhibits, the only support plaintiff offers for their definition of a "budget estimate," is the deposition testimony of Steven Meers, Fluor Daniels Director of Process Engineering. He says that a budget estimate is "an estimate that has sufficient engineering behind it so that the scope is defined, and then you'll have a scope that is associated with a cost and then you can monitor the progress of the project . . ." Meers Dep. at 16. The only thing this excerpt of the transcript reveals, and in fact the only thing a review of the

[9]Former Puralube CFO.

transcript reveals, is that this is Mr. Meers' definition of a budget estimate. There is absolutely no evidence demonstrating that this is a term that has any special meaning in the industry, let alone no evidence suggesting that a budget construction estimate and a budget estimate are the same.

Puralube alleges that the misrepresentation occurs because Fluor Daniel now contends in its brief that it never intended that the response to the RFP would constitute a budget estimate, citing pages 5 and 6 of plaintiff's brief. The success of this argument depends on two factors, neither of which are present. First, the Court must accept defendant's position with respect to the alleged known meaning of the term "budget estimate." For the reasons stated above, the Court declines to do so. Second, even accepting in full defendant's contention concerning the meaning of budget estimate, the Court would have to find that plaintiff was aware of this meaning when he submitted his proposal, and intended his proposal to reflect such a meaning, or at least intended that Puralube ascribe such a meaning to its proposal. There is simply no evidence in the record supporting these conclusions, let alone anything that would rise to the level of clear an convincing evidence. To the contrary, virtually all of the evidence in the record supports Fluor Daniel's contentions regarding their proposal, that it was intended to be a rough,

conceptual, screening estimate.[10] As there is no genuine issue of material fact concerning any alleged misrepresentations, summary judgement on Count V is appropriate.[11]

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[10]The Court also notes that the proposal clearly states that construction services were outside the scope of the proposal. Both sides disagree about what exactly the RFP called for in this regard, with Fluor Daniel claiming that the RFP only wanted "estimating services," and Puralube contending that the RFP was for engineering and construction services. While it may very well be that Puralube's understanding is correct, the fact that Fluor Daniel submitted a proposal explicitly stating that construction services were outside the scope of the proposal is further evidence to the Court that Fluor Daniel did not intend to mislead anyone when they said that they were submitting the proposal in accordance with the RFP. At worst, they misunderstood the RFP, but there is absolutely no evidence of an intent to misrepresent.

[11]On page 73 of their brief, Puralube suggests that they can show at trail that Fluor Daniel uttered many misrepresentations, although they concededly only point to just one of them for the purposes of defeating the motion. On page 75 of their brief, Puralube alludes to misrepresentations purportedly made that Puralube could rely on the predetermined range of $26.5 million, and that Fluor ignored this goal. While the record does support the idea that, over the course of the summer and fall Fluor Daniel was aware of the fact that Puralube was expecting the project to be within a certain range, and Fluor Daniel, at least to some degree both encouraged and ignored this expectation, Puralube never attempts to demonstrate the requisite intent behind these actions at the time Fluor was selected, however, and this failure is fatal. Although the evidence points to a tremendous degree of bungling and mismanagement from Fluor Daniel, it does not in any way suggest that Puralube was fraudulently induced to engage Fluor Daniel for the project. Puralube also suggests that a misrepresentation occurred when Mack Torrence allegedly misrepresented his authority to commit to an investment. The record reveals that it was clear to both sides that a financial commitment was an important factor in the selection of Fluor Daniel, and Mr. Torrence did "propose" that Fluor would be willing to commit up to $10 million. It is also clear that an agreement was never reached on a financial commitment, and there is no evidence to suggest that Mr. Torrence intended any misrepresentation when he proposed committing $10 million. Instead, Puralube has attempted to suggest that what Mr. Torrence was misrepresenting was his authority to commit money to the project at all. The only place this argument is even slightly developed is on Page 11, note 16 of defendant's brief. In that footnote, they characterize the testimony of Mr. Frank as saying that Mr. Torrence specifically told Mr. Frank that he had personal authority for $10 million, and anything he said about the approval process was reasonably uncomplicated. The claim is, essentially, that there was a more cumbersome approval process than allegedly represented to Mr. Frank, and others in the company were skeptical about investing from the start. Mr. Frank's admitted lack of memory about what the approval procedures actually were, juxtaposed against counsel's description of a "cumbersome review at higher levels than they represented in the bewildering hierarchical maze at Fluor Daniel" is hardly evidence of any fraudulent

Because the Court disposes of all of defendant's counterclaims for which plaintiff's damages argument is relevant, the Court need not address it here.

In conclusion, this Court determines that there are genuine issues of material fact on Counts I and II of plaintiff's claim, and Count II of defendant's counterclaim, and accordingly will deny plaintiff's motion for summary judgement on those claims. The Court will grant plaintiff's motion with regard to the rest of defendant's counterclaims, because there are no genuine issues of material fact, making judgement as a matter of law in favor of the plaintiff appropriate.

An appropriate Order follows.

Clarence C. Newcomer, J.

misrepresentation, which is probably why counsel chose to leave this argument in a footnote and let his passing reference to it 60 pages later in his brief be the extent of his discussion on the issue. In any event, because Puralube has failed to develop any of these arguments sufficiently to support all of the elements of fraudulent inducement, they cannot survive summary judgement.